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WEST JERSEY TITLE AND GUARANTEE CO. *v.* BARBER (CLERK).[1]. COURT OF CHANCERY OF NEW JERSEY.

Public Records—Right to Inspect—Remedies when Access is Denied.

A corporation duly organized under the laws of New Jersey for the purpose of the examination, insurance and guaranty of the title to lands and estates, or interests in lands, in the State, and the issuing of certificates, policies, contracts and undertakings therefor, is entitled to the same right of access to and examination of the public records of the county as an individual.

When employed to examine the title to any particular piece of property, such corporation is subrogated to the right of its employer to have such access, and the fact that it contemplates making a contract of guaranty of the title to the land in question does not detract from such right of access.

When the custodian of the records of which examination is sought refuses to permit such a corporation to enjoy the right of access to them to which it is entitled by law, and such right is clearly established, the proper remedy is by injunction to prevent the custodian from interfering with the corporation in the exercise of its right. The remedy by mandamus is, in such a case at least, entirely inadequate.

Opinion by PITNEY, V. C.

THE PROPER REMEDY FOR AN INTERFERENCE WITH THE RIGHT OF ACCESS TO PUBLIC RECORDS.

At common law there was no such right of free access to and examination of public records as now exists by statute in most of the United States. The right existed only in regard to such records as had some bearing upon a case pending (when the usual practice to obtain an examination was by motion in the cause), or where the records sought to be examined were those records of a corporation in which the corporators were supposed, in the view of the law, to have a peculiar interest. (Hereford *v.* Bridgewater, Bunb., 269; Att.-Gen. *v.* City of Coventry, Bunb., 290; Herbert *v.* Ashburner, 1 Wils., 297.) In the latter case mandamus was held to lie, even when there was an action pending. (R. *v.* Tower, 4 M. & S., 162; Harrison *v.* Williams, 4 D. & R., 820.) And in the courts of the United States, where the right re-

[1] Reported in 24 Atl. Rep., 381.

mains still subject to some of its common-law limitations, the usual practice is by petition for leave to examine. (Re McLean, 9 Cent. L. J., 425 (S. C., 8 Repr., 813); Re Chambers, 44 Fed., 786.)

But which is the proper remedy under the statutes which give the right of free access to all public records to any citizen, irrespective of any interest he may have in them? Is it mandamus to compel the custodian of the records to allow the relator the free exercise of his right, or injunction to prevent him from interfering with that right? The principal case declares that injunction is the only adequate remedy; but an examination of the cases will show that the weight of practice, if not of positive authority, is overwhelmingly in favor of the procedure by mandamus. The latter was the form of action adopted in Fleming *v.* Clerk, 30 N. J. L., 280; State *v.* Williams, 41 N. J. L., 332; Peo. *v.* Cornell, 47 Barb. (N. Y.), 329; Peo. *v.* Reilly, 38 Hun. (N. Y.), 429; Peo. *v.* Richards, 99 N. Y., 620 (S. C., 1 N. E. Rep., 258); Webber *v.* Townley, 43 Mich., 534; Diamond Match Co. *v.* Powers, 51 Mich. 145; Burton *v.* Tuite, 78 Mich., 363; Aitcheson *v*, Huebner, 51 N. W., 634; Hawes *v.* White, 66 Me., 305; Bean *v.* Peo., 7 Col., 200; Stockman *v.* Brooks (Col.), 29 Pac,, 746; Phelan *v.* State, 76 Ala., 49; Randolph *v.* State, 82 Ala., 527; State *v.* Rachac, 37 Minn., 372; State *v.* Meadows, 1 Kans. 90; Cormack *v.* Wolcott, 37 Kans. 391; Boylan *v.* Warren, 39 Kans., 301; Comm. *v.* O'Donnel, 12 W. N. C., 291. It is true that in many of these cases the decision was against the right of the relator to exercise the right of examination claimed; but in none of them, except in Diamond Match Co. *v.* Powers, was it even hinted that the complainant had made a mistake in the form of his action. Indeed, in two instances, Hawes *v.* White and Stockman *v.* Brooks, it was expressly asserted that mandamus was the proper remedy, without, however, entering into any discussion of the question, or giving any reason for that assertion. On the other hand, very few cases attempt to assert the right of examination by bill and injunction; and in but one of these is it explicitly asserted that such is the proper remedy, the others either refusing the injunction, or allowing it without any discussion on that head. Buck *v.* Collins, 51 Ga., 391; Scribner *v.* Chase, 27 Ill. App., 36; Belt *v.* Abstract Co., 20 Atl., 982; West Jersey Title & Guarantee Co., *v.* Barber (the principal case), 24 Atl., 381.

It seems clear that as far as results only are concerned, it makes no practical difference which form of action is adopted; for in either case the result is the same. If the complainant proceeds by mandamus, he obtains a decree commanding the respondent to permit him to exercise his right of examination of the records; if he proceeds by bill and injunction, he obtains a decree commanding the defendant to abstain from any interference with him in the exercise of that right; thus in either case guaranteeing to him the free and undisturbed exercise of it. The deciding point, then, must be the nature of the right which is sought to be enforced; whether it is one which is more properly enforced by mandamus, or by injunction.

The essential distinction between mandamus and injunction is thus laid down in High on Extraordi-

nary Legal Remedies, 2d Ed. (1884), sec. 6, p. 10: "An injunction is essentially a preventive remedy, mandamus a remedial one. The former is usually employed to prevent future injury, the latter to redress past grievances. The functions of an injunction are to restrain motion and enforce inaction, those of a mandamus to set in motion and compel action. In this sense an injunction may be regarded as a conservative remedy, mandamus as an active one. The former preserves matters *in statu quo*, while the very object of the latter is to change the status of affairs and to substitute action for inactivity. The one is, therefore, a positive or remedial process, the other a negative or preventive one. And since mandamus is in no sense a preventive remedy, it cannot take the place of an injunction, and will not be employed to restrain or prevent an improper interference with the rights of relators." So, too, an injunction is the proper remedy where the injury is such "as from its continuance or permanent mischief must occasion a constantly recurring grievance, which cannot be otherwise prevented." Hilliard on Inj., sec. 31, p. 20. In general, "it is used to prevent future injury rather than to afford redress for wrongs already committed, and it is therefore to be regarded more as a preventive than as a remedial process." High on Inj., 2d Ed., sec. 1, p. 3. The interference of the Court by injunction "rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which, on just and equitable grounds, ought to be prevented." Wait, Act. & Def., Vol. 3, p. 687.

In order to warrant the issuing of an injunction, then, the complainant must have a clear right which is injuriously affected by the acts of the defendant; and if the right be not clear, he will be sent to law to establish his right. The same is true of mandamus: Wait, Act. & Def., Vol. IV, p. 376; but that being a proceeding at law, is an eminently proper method of establishing a questioned right. It is worthy of note that a large majority of the cases in which mandamus was invoked to assert the right to the examination of public records were cases of first impression, or cases in which the right claimed did not exist; and it may be that this fact had some influence in determining the form of action. But where the right is clear, there are certain advantages peculiar to the process by injunction which that by mandamus does not possess.

In the first place, as quoted above, mandamus is used to redress past grievances, injunction to prevent future injury. In the class of cases under discussion, then, when the injury complained of is a single refusal to permit the complainant to examine the records at a particular time, and there is no claim that he has any desire to examine them at the present or any future time, and consequently no likelihood that the injury may be repeated, there would seem to be good reason for holding that mandamus is the proper remedy, the injury being past. In such a case the process by mandamus would permit the relator to examine the records for the purpose in his mind at the time when the examination was denied him; but would not afford him any assurance that the right would not

be denied him at any future time when he might again have occasion to examine them. In other words, it would be entirely in the power of the custodian of the records to refuse the relator access to them at each and every time when he should wish to examine them, and he would be put to the trouble of a new writ for each such invasion of his right. In point of fact, this was done in one case, that of Burton *v.* Tuite, 80 Mich., 218, and although the Court got over the difficulty by calling in the doctrine of contempt, yet there are reasons which would lead one to doubt the propriety of such an exercise of the strong arm of the Court. If the order was for a single examination, the officer would hardly be in contempt for refusing a second; and if the order was to permit any and all examinations, it is not quite clear how such an order could be made with propriety when one refusal only had been complained of. It would seem, then, far preferable to use the extraordinary powers of the Court in the first place by way of injunction, which would properly cover all instances; and contempt could then be predicated with propriety of any violation of the injunction decree.

In the second place, the cause of action in such cases is rather for interference with a right, than for the establishment or enforcement of a right; and in such a case the proper remedy is by injunction to prevent such interference.

In the third place, the remedy by mandamus is wholly inadequate to redress a continuing grievance, for the simple reason, as has been seen above, that the writ only applies to past grievances, and for every successive invasion of the complainant's rights he is obliged to sue out a new writ; provided, of course, that the respondent is contumacious. And while there is authority for the view that redress can be had by process for contempt, yet it may be very plausibly argued that the exigency of the writ is answered by permission for a single examination, and that it is then exhausted. This, too, would seem to be the correct inference from the nature of the writ. But in the case of injunction no such argument could be urged; for then the command of the writ would be to abstain from all interference with the complainant in the exercise of his right of examination, and its exigency would not be exhausted during life, or the continuance of the defendant in office.

Finally, the Court will not grant a mandamus unless convinced that it will be practically effective to secure the object aimed at: Shortt, Inf. Mand. & Quo. War., p. 246. And there are strong reasons for believing that mandamus would not be an efficient, or perhaps too efficient, remedy in many cases. When the right claimed is one that would require the use of the office of the custodian for many days, so as to be likely to interfere with the duties of the office, or with the rights of others of the public, mandamus would simply command the officer to permit the relator to exercise his right, without regard to the rights of others, or the paramount claims of the public business, and the courts would have no power, in adjudicating the bald question of right, to annex to that right the necessary restrictions. This very argument was one of the reasons for refusing the writ in several of the cases; and while it

cannot avail to defeat the right when it exists, supposing that mandamus is the proper remedy, it should nevertheless be one of the potent factors in settling the question whether or not it *is* the proper remedy. In granting an injunction, however, the Court can annex to it all proper and necessary qualifications of the exercise of the right interfered with, and *uno flatu* settle all the conflicting interests and rights of the officer, the public and the complainant.

These reasons are very fully and clearly stated in the two cases which have condescended to discuss the question, where it would seem that the courts arrived at their conclusions independently of each other. At all events, the earlier case is not referred to in the latter. The former case, however, Diamond Match Co. *v.* Powers, 51 Mich., 145, went off on other grounds, but the discussion of the present question is very interesting and instructive. "It seems evident that in any case where the claim is for a continuous use of the record office and its public contents from day to day and week to week, and not merely for a single occasion, with all its material facts defined, there must be great, if not insuperable difficulty in enforcing the claim by mandamus. The register has rights and duties which must be respected; so the general public have rights as well as the claimant; and the conditions are not steadily the same. They are subject to variation. On every occasion each must act reasonably, and with proper regard for the rights and duties of the others. As the circumstances vary the conduct must vary, so as to secure conformance to the rule of reasonable action by which the right is to be regulated. When the case presents a single occasion, and calls for an act which is presently determinate, it is entirely practicable to direct the act by mandamus. But where the case contemplates something continuous, yet variable in its conditions and aptitudes, the remedy by that process seems an unfit one. It is the office of mandamus to direct the will, and obedience is to be enforced by process for contempt. It is, therefore, necessary to point out the very thing to be done; and a command to act according to circumstances would be futile."

The advantages of the procedure by injunction are even more forcibly pointed out in the opinion of the Vice-chancellor in West Jersey Title & Guarantee Co. *v.* Barber, 24 Atl., 381 (the principal case): "With regard to the remedy by *mandamus* it seems to me that the slightest consideration will show that it is entirely inadequate. If the complainant has the right which it claims to have access to the books and records in defendant's office, it is one which, from the nature of the business, is a continuing one, and may arise every day, and one which, to be of any value, must be exercised at once. To delay its exercise until it could be determined by a court of law would be simply to deny it, because, before the judgment could be obtained, the value of its exercise in the particular instance complained of would be lost. If, indeed, the right of the complainant here in question is not so clearly established at law as to warrant the interference of this Court by the strong arm of an injunction, that alone is a sufficient answer to the complainant's case, and the

complainant will be, as a matter of course, turned over to a court of law, to establish there its right by a test case; but when that is once established, it would be a denial of justice to say that, in every instance that it is desired to exercise the right already clearly established, it must resort to its legal remedy, and can have no help from this Court. If, then, the complainant's right is clear at law and not open to question, it seems to me that it is entitled to the aid of this Court to enjoin the defendant from preventing its exercise."

These arguments are certainly entitled to careful consideration; and a close examination will find but little that can be urged against them. It may be safely concluded, then, that whenever the right of examination claimed is not for a single instance, but for a continuous period of time, whether long or short, the proper remedy is by injunction; and that the remedy by mandamus in cases of this nature is confined to those instances in which a single exercise only of the right is claimed; or, to give this discussion a concrete value, that the proper remedy for any interference with the right of examination by a private individual, searching the records for his own private purposes or curiosity, would be by mandamus; but the remedy for an interference with the right of examination by an abstractor of titles or a title insurance company, whose business naturally calls for constant and even daily investigation of the records, would, on account of its continuous nature, be by injunction.

ARDEMUS STEWART.

EARLY *v.* COMMONWEALTH.[1] SUPREME COURT OF APPEALS OF VIRGINIA.

Confessions—When Deemed to be Voluntary.

On the trial of an indictment for arson, evidence was offered by the prosecution to prove certain confessions made by the accused to a private detective, employed to work up the case, who arrested him. The accused testified that the detective said "that if he would tell him all about it he would make it easier for him." *Held:* affirming the Court below, that the evidence was admissible, as, taking the accused's testimony as true, the inducement was not offered by a person in authority.

LEWIS, P.

ABSTRACT FROM THE OPINION OF THE COURT.

The objection is to the action of the Court in admitting evidence to prove certain confessions by the prisoner. The evidence was objected to on the ground that the confession was not voluntary. The confession was made to the wit-

[1] 11 S. E. Rep., 795.